DOCUMENT RESUME

ED 139 583 RC 009 917

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TITLE	Religious Freedom and the Protection of Native American Places of Worship and Cemeteries.
INSTITUTION	California Univ., Davis. Tecumseh Center.
PUB DATE	Jan 77
NOTE	26p.
AVAILABLE FROM	Native American Studies, University of California at Davis, Temporary Building 113, Davis, California 95616 ($0.45)
EDRS PRICE	MF-$0.83 HC-$2.06 Plus Postage.
DESCRIPTORS	*American Indians; *Civil Liberties; Constitutional Law; Court Litigation; *Due Process; *Equal Protection; Land Acquisition; Land Use; Laws; *Religion; Religious Conflict; Sanctions; *State Church Separation; State Legislation; Treaties
IDENTIFIERS	*California; Cemeteries

ABSTRACT

Focusing on the protection of Native American places of worship and religious property, this monograph cites several pertinent guarantees of religious freedom found in constitutional or treaty laws, and in court decisions; and gives samples of their abuse throughout history. These guarantees of Native rights are found in the First and Fifth Amendments to the U.S. Constitution; sections of the Treaty of Guadalupe, the Mexican Constitution, California's 1850 Constitution, and the California Act for the Government and Protection of Indians; and various California Indians claims cases. Appended are two versions of the California bill AB 4239 (the one passed by the State Assembly only and the final version passed by the entire legislature). This bill resulted from a conference held at D-Q University in late 1975 to develop legislation to protect Native American cemeteries and sacred places. Also appended is an opinion by the California State Attorney-General's Office summarizing the legal protections available for Native cemeteries under chapter 827, Statutes of 1971. This opinion covers: whether chapter 827 gives the task force created pursuant to its provisions the power to prevent the disturbance of native California Indian burial sites; whether the chapter authorizes the State to prevent such disturbances; and whether there is any provision of law other than chapter 827 which could be used to prevent the disturbance of such burial sites. (NQ)

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ED139583 '45

Religious Freedom and the Protection of Native American Places of Worship and Cemeteries

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January 1977

RC009917

Most European-Americans take for granted the guarantees of religious freedom found in the United States Constitution and most of the state constitutions. They assume that they and their co-religionists will be able to worship in peace, without harassment by either government officials or private persons.

Tragically, Native Americans have not been protected in the same way as have Whites. Over and over again, the U.S. federal government has violated the "separation of church and state" doctrine by seeking to forcibly suppress American religious practices. Time and time again, government agencies have sought to forcibly convert Native People to religious sects popular among Europeans. All of this was, and is, illegal - however, it is not my purpose here to review all such infractions of the Constitution but rather to concentrate on how Native American religious rights are being violated today.

Virtually all religious sects or groups possess "places" of special significance in their religion. These "places" may consist wholly in "churches," i.e., buildings or structures used for worship and worship-related activities, or they may include dedicated (sanctified) cemeteries, shrines, gardens, or other "outdoor" areas where worship, prayer, or other devotional activities occur.

These sacred places, dedicated in some way to worship or (as in the case of religiously-dedicated cemeteries) to things associated with the "after-life," are central to the maintenance of any religion.

The power to seize, confiscate, take, destroy, or otherwise deny the use of a sacred place is the power to destroy a religion. This is especially true when the place is unique. For example, one could not seize St. Peter's Cathedral in Rome or the Shrine of the Virgin of Guadalupe in Mexico, or the Mormon Tabernacle in Salt Lake City and offer a replacement site. These places are unique because of sectarian beliefs about them.

However this point is not really crucial because any government having the power to take or destroy any sacred place, by seizure or "imminent domain," has the power to take or destroy all such places. That is, it does not matter if a replacement site is offered, since the replacement site can also be seized at will. Thus there can be no security for the practice of religion unless places of worship are secure from seizure or taking altogether.

The First Amendment to the U.S. Constitution specifically states that "no law respecting the establishment of religion" shall ever be legal. In practical terms this means that no law can have the effect of depriving any religion of the right to exist, to worship, and to have places of worship. A law (such as an "imminent domain" law) which authorized the confiscation or taking of places of worship would be a law directly affecting religious practice and would, therefore, be unconstitutional.

It is also a now-established principle that "the barrier between church and state" erected by the First Amendment is designed to protect all religions and all sects and not merely Christian beliefs. Jewish, Buddhist, Islamic, Hindu, and Native American traditions are all equally protected. Furthermore, protection of religious freedom has to be understood to be freedom for the followers of a given tradition to practice their religion as they understand it, since any other attitude would make a mockery of the Constitution.*

This is very important to keep in mind as we consider Native American religious tradition and practice, because the latter differs somewhat from Christian practice in the United States (although it resembles other religious traditions in certain features).

Before proceeding to an examination of Native American religious practice, however, we need to examine several other guarantees of Native rights.

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* The courts have recognized certain exceptions to the above, but they are not applicable to this discussion.

The Fifth Amendment to the United States Constitution states that "no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation." Quite clearly Native Americans are covered by this guarantee since reference is made to "all persons." [See Jack D. Forbes, "Indian Property Rights and the Public Domain of Nevada," Nevada State Bar Journal, July 1965.] In the case of the seizure, by arbitrary confiscation, of Native property it is clear that the requirements of both due process and just compensation must be met. In the case of places of worship and religious property (which is the sole subject of this article) due process would require: (1) that the act of seizure specifically take note that places of worship were being seized; (2) that appropriate court proceedings, or other impartial judicial procedures, review the process; and (3) that the First Amendment guarantee of separation of church and state be specifically considered.

In short, there can be no due process for a religion if the religion's existence and maintenance of places of worship is not acknowledged. For example, in an urban renewal project, where an entire neighborhood is being acquired by condemnation or imminent domain, the agency in charge cannot simply seize or acquire the entire neighborhood if there are places of worship there without involving a separate kind of due process for the religious property. The existence of churches cannot be ignored on the pretence, say, that they are only part of an undifferentiated mass of buildings.

Shockingly, however, Native property has often been seized without any reference whatsoever to the existence of religious property located there on. This clearly is a denial of due process.

"Just compensation" cannot be provided for places of worship unless the place of worship is replaceable, that is, can be rebuilt, moved, or replaced with money (compensation). Quite clearly, however, a sacred shrine, or unique center of worship, can never be replaced.

Clearly then the "just compensation" requirement can never, even in principle, be met for such irreplaceable places of worship (such as the Shrine of Our Lady of Fatima in Portugal, the Jewish Temple in Jerusalem, the Muslim holy center in Mecca. the St. Peter's Cathedral in Rome, the Mormon Tabernacle in Utah, and so on).

We can see clearly then that the Fifth Amendment supplements and strengthens the First Amendment in the protection of places of worship and especially in relation to uniquely sacred places. In no way can the seizure or taking of any such place of worship be legal under the Constitution, nor can any title derived from such illegal seizure be valid.

To strengthen the case for the protection of Native property rights, however, we can cite several other pertinent guarantees. Section 9 of the Treaty of Guadalupe Hidalgo between the United States and Mexico states that all former Mexican subjects residing in the United States after 1848 shall have the "free enjoyment of their liberty and property and be secured in the free exercise of their religion without restriction." Article 8 also guaranteed citizenship in the United States to all former Mexican subjects (unless they returned to Mexico or formally elected to retain Mexican status).

The Treaty of Guadalupe Hidalgo, as a contract entered into by the United States Congress and the President, is specifically "a law" of the United States and "a law" taking precedence over any state actions. It also takes supremacy over any act of Congress unless the Congress specifically and unambiguously expresses its intent to set the treaty aside. The guarantee of the "free exercise of. . .religion without restriction" has never been set aside by Congress and is, therefore, still the law of the land.

That the Treaty of Guadalupe Hidalgo and its provisions was applicable to people of Native American race is made specifically clear in court decisions by the Supreme Court of the Territory of New Mexico (Territory vs. Delinquent Taxpayers, 1904 and United States vs. Lucero, 1869) as well as by the Supreme Court of the United States (United States vs. Ritchie, 1854 and other decisions). In the latter case the U.S. Supreme Court held that

> The Indian race having participated largely in the struggle resulting in the overthrow of the Spanish power [in Mexico] and in the erection of an independent

government, it was natural that in laying the foundations of the new government, the previous political and social distinctions in favor of the European or Spanish blood should be abolished, and equality of rights and privileges established. [U.S. vs. Ritchie, as quoted in Cohen, Handbook of Federal Indian Law, p. 384.]

The Mexican Constitution in 1848 (adopted 24 years before) clearly guaranteed Mexican citizenship to all Mexican subjects of whatever race. Therefore it is clear that Native Americans residing in Texas, New Mexico, Arizona, Utah, Nevada, California, and part of Colorado were guaranteed "the free exercise of their religion without restriction" by the Treaty of Guadalupe Hidalgo. It does not matter whether a particular group of Indians were under Mexican control or not, since the provisions of the treaty are protective and inclusive. No mention is made of a requirement that a given resident had to be knowingly a Mexican Subject to be protected by its provisions.

Dr. Donald C. Cutter, a leading authority on Hispano-Mexican history and an expert witness in the California Indian claims case, said of the Treaty of Guadalupe Hidalgo and its applicability to Native Americans:

> Gradually the preponderance of the juridicial evidence clearly favored the Indian of the Southwest as having even greater legal claim to traditional lands than did other Indians. These areas had belonged to these Indians through the right of aboriginal occupancy and possession but also these people had been respected in their rights by the prior sovereigns - an implied respect which was either accidentally or purposefully written into the treaty which transfered the land of those Indians to a new sovereign. . . .
>
> Once it was reasonably well established that the Indians of the Southwest were considered "citizens" under the prior sovereigns, and thereby clothed with protection, it became of interest to investigate what promises and guarantees had been offered to those who held citizenship under Mexico.

Cutter found that all of the U.S. military commanders in the Southwest made promises almost identical in language with the guarantees eventually incorporated into the Treaty of Guadalupe Hidalgo. [Donald C. Cutter, "Clio and the California Indians Claims," in Journal of the West, V. XIV, no. 4, Oct. 1975, pp. 38, 40.]

Quite clearly it is a "restriction" on the "free exercise" of religion, as guaranteed by the treaty, to seize places of worship and to make it difficult or impossible for a religion to exist.

Most state constitutions also contain clauses protecting the free exercise of religion. The 1850 Constitution of the State of California also states that "all men" have certain "inalienable rights" including the right of "acquiring, possessing and protecting property." This clearly means that people of Native race possessed protected property rights since "all men" are mentioned rather than "all White men" or "all citizens."

The Legislature of the State of California also enacted an Act (April 22, 1850, an Act for the Government and Protection of Indians) which stated in section 2:

> Persons and proprietors of land on which Indians are residing, shall permit such Indians peaceably to reside on such lands, unmolested in the pursuit of their usual avocations for the maintenance of themselves and families: Provided, the White person or proprietor in possession of lands may apply to a Justice of the Peace in the Township where the Indians reside, to set off to such Indians a certain amount of land, and, on such application, the Justice shall set off a sufficient amount of land for the necessary wants of such Indians, including the site of their village or residence, if they so prefer it; and in no case shall such selection be made to the prejudice of such Indians, nor shall they be forced to abandon their homes or villages where they have resided for a number of years; and either party feeling themselves aggrieved, can appeal to the County Court from the decision of the Justice: and then divided, a record shall be made of the lands so set off in the court so dividing them, and the Indians shall be permitted to remain thereon until otherwise provided for. [Chapter 133, Statutes of California, as quoted in Heizer and Almquist, The Other Californians, p. 212.]

This section, which was apparently not repealed until approximately 1934, clearly guarantees the rights of Native Americans to every village occupied in 1850 in the State of California, as against any seizure by state, local, or private citizen action. It might be argued that the state of California had no legal anthority to enact such legislation since the federal government has supremacy in Indian affairs. This argument is invalid, however, because: (1) exclusive federal supremacy applied to the taking of Indian land, not to the protecting of it. A state has jurisdiction over its own citizens and it can restrain them from taking Indian land. (2) While a state cannot give land claimed by the federal government to Indians it can recognize an Indian right to a usufruct (use-right) on land not claimed by the federal government. (3) The Act of 1850 really is nothing more than a duplication of prior Mexican law and practice. That is, Mexican law recognized Native village rights even when the latter were located within the boundary of a grant made to a Mexican subject. (Many land-grants in California specifically contain a clause guaranteeing Native American usufructary rights in the area of the grant). These Native property rights, for such they are, were in turn confirmed and guaranteed by the Treaty of Guadalupe Hidalgo.

Professor Cutter, as a result of his research for the California Indians claims case, stated:

> It was clear that Indians still resided on some of the areas [rancho grants] which during the years of prior sovereignty [pre-1848] had been distributed as private land grants to individuals. Investigation showed that in a substantial number of cases there was a "reserve clause" which indicated that the person receiving the usufruct to the land obtained it under the burden that the Indians were not to be disturbed in their continued occupancy of the land which they had utilized up to that time.

The attorneys for the California Indians in the claims case decided not to press for money compensation for the later loss of the above rights, however, their decision was apparently not primarily based upon legal considerations. Cutter states:

> After some research had been done on the question of these residual rights, a decision was made by the lawyers involved in the California Claims case to abandon any attempt to claim on behalf of the Indians any of these residual equities which the Indians might have had in any of the land grants which had been patented by the United States Government.
>
> This decision was arrived at after a "strong suggestion" by an officer of a title insurance company who feared the possible consequences of opening the Hispanic land grants to legal inquiry. . . .[Cutter, "Clio and the California Indian Claims," p. 39.]

This, of course, is an interesting example, if true, of professional conduct on the part of claims attorneys, showing collusion between the attorneys and persons with a financial interest in conflict with Indian interests. On the other hand, their decision may be a blessing in disguise because it means that Native American property interests in the former Mexican land grants still persist and have in no way been quieted by any money compensation.

In any case, the California Act of 1850, in essence, merely confirms and codifies those Native American property rights already well established under Mexican law and guaranteed by a U.S. federal treaty. There is, therefore, no conflict between the Act of 1850 and federal supremacy in Indian affairs.

What this means for religious freedom (in California) is that every village occupied in 1850, with its associated religious and sacred places (places of worship and cemeteries) and specifically its ceremonial buildings (churches) and sweat-lodges were absolutely protected from seizure even if located within the boundaries of parcels of land claimed by non-Indians. This act was perhaps never enforced, but nonetheless it remained the law of the state until about 1934.

Thus any village (and church site) seized in California between April 22, 1850 and approximately 1934 was taken illegally under state law. Furthermore, the Act of 1850, in effect, places a restriction on the deeds of all parcels on which villages were located. It should be also borne in mind that the statute of limitations is not

applicable in this instance because of the special federal protection of Native Americans. The seizure of Native villages was an illegal act against property rights of people held to be under the "wardship" or "trusteeship" of the United States and was, therefore, an act against the United States.

It has also been argued, in certain court cases of the period 1886-1903, that Native Americans lost whatever property rights they might have had in California by virtue of their failure to present their claims in 1851-1853. This argument cannot stand, however, because (1) the language of the federal acts relating to Mexican land-grant claims clearly was not intended to encompass Indian claims; (2) the various Indian groups were never duly notified of the existence of the claims process, thus violating due process; and (3) native titles, whether within a Mexican grant or outside of it, were not derived from a grant of the Mexican government but were merely recognized by the latter.

"Indian title," derived from occupancy from time immemorial, has been held to be valid in numerous Supreme Court cases, and, in any case, it represents a superior title to that derived from a deed or a grant. Thus, for example, the title of the German people to Germany is not derived from any grant, deed, or other document of record. In turn, it is superior to the titles of individual German property-owners based upon deeds.

That the United States government itself did not believe that the private land claims act of 1851 related to Native property is shown clearly by the fact that in 1851 and 1852 the government dispatched official commissioners to negotiate treaties of cession with many California tribes (and, of course, other treaties were later negotiated in Arizona, New Mexico, Nevada, Utah and Colorado). As Professor Cutter states: "The very fact of having sent these government agents to treat with the Indians was an obvious admission on the part of the United States that the California Indians held equity." [Cutter, "Clio and the California Indian Claims," p. 42.] (Incidentally, the California treaties were never ratified by Congress and thus no land was lost by the Natives through treaty cessions in that state.)

But, of course, we are not concerned here with general title to land but only with title to places of worship and sacred property. Clearly, it would have been unconstitutional for the United States Congress to have ever passed any law which had in view the taking of Native American churches, cemeteries, and places of worship.

Now what was the nature of Native worship in terms of sites utilized? Uniformly, across the entire United States, Native people possessed or used a number of places in the outdoors for religious activity. Some such places were not unique and were interchangeable (such as a forested area used in the East for vision-quest purposes). On the other hand, almost every nation used certain places of an absolutely unique and sacred character. These places would be like the sacred Blue Lake area of the Taos people (recently returned to their control), or the "Doctor Rock" region in the Klamath River area sacred to the Hoopa, Karok, and Yurok, or the Mount Diablo area, sacred to many central California tribes, or Newberry Peak, sacred to the Mohave and Quechan peoples. There are, of course, many other such uniquely sacred places, usually being craggy rock buttes, lakes, springs, or peaks.

> There's a great big lake, Devil's Lake, that used to be Kiowa territory. Many men went to Devil's Lake to get that gift [of a vision]. Lay down four days and nights. Sometimes that water boils and roars and speaks, and the test comes. . . . [One Kiowa-Apache man had a vision there and then later returned to the lake to stay.] They followed his [tepee] pole tracks to where they led into the water. They say that Kiowa made lots of visits over there and lying on their backs they could hear that tomtom beating under the water and the singing of medicine songs. Echoes are there yet today. [Guy Quetone, in Sylvester M. Morey, ed., Can the Red Man Help the White Man? New York, Gilbert Church, 1970, pp. 30, 32.]

The use of outdoor sacred places is an essential, integral part of Native religion. Ohiyesa (Charles Eastman) describes the philosophy behind this attitude:

> There were no temples or shrines among us [Sioux] save those of nature. . . He would deem it a sacrilege to build a house for Him who may be met face to face in the mysterious, shadowy aisles of the primeval forest, or on the sunlit bosom of virgin prairies, upon dizzy spires and pinnacles of naked rock, and yonder in

> the jeweled vault of the night sky! He who enrobes Himself in filmy veils of cloud, there on the rim of the visible world where our Great-Grandfather Sun kindles his evening camp-fire, He who rides upon the rigorous wind of the north, or breathes forth His spirit upon aromatic southern airs, whose war canoe is launched upon majestic rivers and inland seas - He needs no lesser cathedral! [Charles Eastman, The Soul of the Indian, Fenwyn Press, 1811, pp. 5-6.]

* * *

> In the beginning there was water everywhere. Time passed, and from the depths of the water two beings emerged. They were Kwikumat and Blind Old Man, who was blinded upon emerging with his eyes open. . . .
>
> Kwikumat now created real people. He made a Quechan man, a Quechan woman, a Kamia man, a Kamia woman, and so on with all the Yuman groups. . . . Kumastamxo, the spiritual leader of the Yuman peoples, was then created by Kwikumat, and the latter departed from the world scene. Kumastamxo and the various peoples made their home on Avikwamé [Newberry Mountain], a mountain located thirty miles north of Needles, California. . . . A ceremonial house was built on the summit of this mountain, and it is toward this home of Kumastamxo that the Quechans direct their dreams. [Jack D. Forbes, Warriors of the Colorado, University of Oklahoma Press, 1965, pp. 5-6.]

Many mountains are sacred both because they figure in the creation of human beings and also because they are places for vision-seeking. Another such peak is Pupunia or Cerro de los Bolbones (now called Mt. Diablo).

> There was once a time when there were no human inhabitants in California. There were two spirits, one evil and the other good. They made war on each other, and the good spirit overcame the evil one. At that period the entire face of the country was covered with water, except two islands, one being Mount Diablo and the other Eagle Point on the north. There was a coyote on the peak, the only living thing there. One day the coyote saw a feather floating on the water. As it reached the island it turned into an eagle, which flew upon the mountain. The coyote was pleased with his new companion; dwelling in harmony together, they made occasional excursions to the other island, the coyote swimming and the eagle flying.
>
> After some time they counseled together and concluded to make Indians, and as the Indians increased the water decreased, until where the water had been there was now dry land. . . . A great earthquake. . .severed the chain [of coast mountains] and formed the Golden Gate. . . .

The Spaniards named the mountain "Diablo" (Devil) because in 1806 they were defeated by Indians when:

> an unknown personage, decorated with the most extraordinary plumage, and making diverse movements, suddenly appeared near the combatants. The Indians were victorious and the unknown one (Puy) departed towards the mountain. The defeated soldiers, on learning that the spirit went through the same ceremony daily and at all hours, named the mountain Diablo, in allusion to its mysterious inhabitant. . . .

Another story states that:

> Once, in an expedition against horse-thief tribes. . . . [the Spaniards] came up with a party of freebooters laden with spoils of a hunt, and immediately gave chase, driving them up the steep defiles which form the ascent of the mountain on one side. . .they were pressing hard after them, when from a cavernous opening in their path there issued forth such fierce flames, accompanied by so terrible a roaring, that, thinking themselves within a riata's throw of [hell they]. . .went down the mountain faster than they went up. . . . [History of Contra Costa County, Historic Record Co., 1926, 86-87].

Pupunia or Bolbón Peak continues to be a sacred mountain for those central California California Native People who managed to survive the extermination campaigns of 1849-1880.

Another general type of sacred place is that associated with cemeteries and ancient village sites (called "mounds" in the eastern half of the country). Native People did not forget their dead, in many parts of the country, and cemeteries were highly sacred places. Contrary to what some White people might believe Native People become highly incensed when their cemeteries are dug up and when the bones of the dead are put on display or stored in crates in some museum basement.

Thomas Jefferson was most interested in an Indian burial mound located near his home in Virginia. This particular mound housed about one thousand bodies and was located near an Indian town probably abandoned by 1676 or earlier. Nonetheless, in approximately 1755 the mound was still remembered by, and still being visited by Indian people.

> ...for a party passing, about thirty years ago, through the part of the country where this barrow [mound] is, went through the woods directly to it, without any instructions or inquiry, and having staid about it for some time, with expressions which were construed to be those of sorrow, they returned to the high road, which they had left about half a dozen miles to pay this visit, and pursued their journey. [Adrienne Koch and William Peden, editors, The Life and Selected Writings of Thomas Jefferson, New York, Modern Library, 1944, pp. 224-225.]

In addition to the above kind of places those Native groups living in California, other parts of the Far West, the Southwest, and the eastern half of the country had regular places of worship and religious ceremony connected with each village. These features could be called "churches" or "temples" depending upon the area. In the Virginia region, for example, the Powhaten people had several major sacred centers, the largest being at Uttamussak in present-day King William County. This center featured a large "temple" or ceremonial house and several other related structures. Each village also had a ceremonial center, one or more sweat-lodges (where religious worship also ocurs), ossuaries and cemeteries for the dead, and a ceremonial dance area.

In California most villages possessed a "round-house" or similar ceremonial structure, an outdoor dance area usually adjacent to the "roundhouse," one or more cemeteries or places where ashes were buried, and one or more ceremonial sweat-lodges.

All of these features are essential parts of Native American worship and constitute the equivalent of churches, religious shrines, and sanctified cemeteries for non-Indians.

What happened to these churches and cemeteries associated with villages? One thing is certain, they were seldom (if ever) abandoned voluntarily. From the east coast to the west coast most such villages were simply seized by White people, burned to the ground or otherwise destroyed, without regard to any law whatsoever. In Virginia, for example, Whites seized most villages without even the pretence of due process. In 1675-1676 every American village in Virginia was burned and looted by White terrorists led by Nathaniel Bacon. Some villages were subsequently rebuilt but most were seized after 1700, or were relocated repeatedly. (Many eastern Indians actually dug up their ancestor's bones, when time allowed, and carried them with them to their new village locations).

In California, at the other side of the country, Native People were repeatedly forced away from their villages, primarily between 1850 and the 1870's when the Indian population was being reduced by over 80% due to murder, enslavement, and malnutrition. Along the coast south of Sonoma many villages had been forcibly extinguished by the Spaniards before 1835 but many were resettled between 1835 and 1845 as Indians left the missions to return to their old homes.

The process of taking native villages did not cease, however, until the last free Indian settlements were destroyed or until White people had satisfied their greed for land. The period of the 1880's to early 1900's saw many remaining villages seized.

> An authority of the period, Professor Donald Cutter, tells us that the Indian: had no recourse in law since no White man could be convicted on the evidence presented by an Indian or Indians. Politically he had no vote, nor any hope that he might ever be permitted to vote. . .and physically, he was denied even the most minimum protection of the law to the extent that is was not even considered a crime in California for a White man to kill an Indian. . . .Those Indians who chose to challenge the new order of things were shot at, driven off, jailed, beaten, fenced

out or simply disregarded. Professor [Sherbourne F.] Cook presented evidence of lack of conviction for the murder of any Indian in spite of thousands of them having been killed for trespassing, poaching, threatening to rebel, or merely as target practice. . . . [Cutter, "Clio and the California Indian Claims," pp. 43-43.]

In this entire process of seizing native villages no evidence exists to show that White citizens or governmental agencies ever distinguished between secular and religious property. Native churches were destroyed without hesitation and cemeteries were looted, left uncared for, or ripped up for farming purposes.

Some Indians managed to obtain homes on reservations, although in California, Virginia and many other areas they were a minority. In any case there is no evidence to show that the federal government ever made the least effort to replace forcibly abandoned church structures or other religious property. Indeed, the nature of the forced marches used to get Indians to a reservation indicates that little care was exercised even for the lives of the people, let alone any care for their sacred things.

In fact, many reservations became places where the federal government used its authority to suppress and destroy Native American religious practice. In many areas reservations were turned over to Christian sects for direct administration, while all reservations saw forcible methods of conversion to Christianity used. In any case, it is absolutely certain that the federal government never replaced a single Native church, temple, or ceremonial center in spite of the fact that condemnation or imminent domain procedure requires the replacement of such religious structures.

It is equally clear that Native People very seldom, if ever, abandoned a church or religious center voluntarily. Typically, though, it was very dangerous for Indians to be seen moving about the country-side until after 1900. Also the Whites who had seized particular parcels of land generally did not allow Indians to "trespass" on "their" farm or ranch. Needless to state, for an Indian to appeal to a White law enforcement officer for protection of worship rights would have been inconceivable, especially since an Indian's life itself was worth very little. This situation is still very true today. Law enforcement agencies, generally, will not protect Native People nor will they uphold constitutional or treaty law relating to native rights.

Recently a group of Ohlone Indian people sought to protect a cemetery located near Watsonville, California. This cemetery was not "ancient" as burials had been made there within memory. Nonetheless, the grandmothers, children, and others who turned out to try to bring public attention to the matter were met by heavily-armed SWAT squads and U.S. Army troops form nearby Fort Ord (supposedly on "manuevers"). The law enforcement officers cared nothing about "the law" but only that a White man (wealthy and locally powerful) was being "harassed" by brown-skinned people. It seems to be an accepted principle among law enforcement officials that local ordinances always take precedence over the Constitution and other laws whenever it is Indians who would benefit from the latter. Needless to state, no law enforcement official rushed in to demand that the "Supreme Law of the Land" be obeyed, or even that California's cemetery protection laws be observed.

For many years, however, some of the sacred places in the more isolated areas could still be used by Native People. Many were in rough country or in areas with slight White population. Increasingly, though, even these sacred places are being threatened or have already been desecrated. The development of the automobile and the accompanying growth of paved highways, the micro-wave television relay stations, the broadcasting towers, mining and timber-cutting operations, and such federal agencies as the Bureau of Reclamation, the Army Corps of Engineers, the National Park Service, and the U.S. Forest Service are among the threats to sacred places today.

Mt. Diablo (Mt. Pupunia, Bolbón Peak or Cerro de los Bolbones) in California illustrates this process. Bolbon Peak is a sacred mountain for many central California tribes. It is visible from the Sierras to San Francisco and from its top one can see as far north as "Los Tres Picos" (the Buttes, another sacred area) and Mt. Shasta (also sacred). The spiritual power of the mountain is so great that even a Spanish priest is said to have experienced a prophetic vision there and the Bolbón people were reportedly able to defeat a Spanish army with the help of a spirit-power on the slopes of the mountain in 1806.

The top of Bolbon Peak is today part of the Mt. Diablo State Park. On the peak are several huge relay towers, a paved parking lot, and a snack bar. A paved road allows visitors direct access to the summit without getting out of their cars. There are no markers, signs or exhibits telling about the Native People of the area nor are there any references to it being a sacred place.

Bolbon Peak has been desecrated, but why didn't the Indian people protest? Until very recently there was no reason for Native People to protest anything! Even if they had had the money and means to protest their voices would have gone unheard; and, usually, they still are unheard. Why didn't the California State Park System do any research? Why didn't they hire any Indians? Why doesn't the National Park Service ever hire any Indians? If you look into the answers to these questions you will begin to understand why native sacred places are desecrated at will in most states.

In any case, it is now time that something is done to protect Native Americans in their freedom of religion and culture. The constitutional law is already "on the books," but we can't find any police agencies willing to enforce the law. The day when the Federal Bureau of Investigation, or the Attorney-General of South Dakota, or the Attorney-General of Virginia, sees fit to protect the constitutional and treaty rights of Native Americans will be the day when we know that four centuries of racism and injustice are coming to an end!

It would seem that no new laws are needed whatsoever for the protection of Native religious practice, but such is not the case. Why? Because law enforcement agencies usually will not enforce a court decision or a constitutional principle if it favors Native Americans and goes against the interests of some powerful white group or agency. Therefore it will be necessary to seek both federal and state legislation which not only protects and restores Native Churches and places of worship but which also requires law enforcement agencies to enforce these laws. In the meantime, however, Native American legal service programs and attorneys should begin developing litigation designed to protect sacred places. Native organizations and other groups should also begin asking their State Attorney-General to take active steps to protect sites.

Native People have many needs, but without our spiritual heritage everything is lost. Nothing else really matters if that which is sacred in our lives is destroyed. We cannot continue to allow cemeteries and places of worship to be treated in a shameful manner.

Appendix I

A conference was held at D-Q University, near Davis, California, in late 1975 to develop legislation to protect Native American cemeteries and sacred places. Out of this meeting came a bill, AB4239, which was introduced into the California legislature by Assemblyman John Knox. The bill, as can be seen from the attached, had far-reaching consequences, and it was expected by many that it would never by approved. It was opposed by persons from many state agencies (especially in the Department of Parks and Recreation) and by several lobbyists. Nonetheless it moved forward, ably guided by a group of Indian volunteers and by Assemblyman Knox. Finally AB4239 passed its last committee hurdle and faced only a final vote on the Senate floor. At this point, the office of Govenor Edmund Brown Jr. proposed a series of amendments which substantially altered the bill but, nonetheless, offered what appeared to be a workable piece of legislation. The Indian people involved accepted the amendments upon assurance that Governor Brown would sign the bill into law. AB4239 then passed in the Senate by a vote of 27-10 and, after concurrence by the State Assembly, went to the governor's desk. On Sept. 29, Governor Edmund Brown Jr. signed the bill into law.

Two versions of AB 4239 are herein presented, including that passed by the Assembly only and the final version passed by the entire legislature. These versions are presented to give readers blueprints which can be used to develop legislation in other states, if they so desire.

Early Version of AB4239

The people of the State of California do enact as follows:

SECTION 1. Chapter 1.75 (commencing with Section 5097.9) of Division 5 of the Public Resources Code is repealed.

SECTION 2. Chapter 1.75 (commencing with Section 5097.9) is added to Division 5 of the Public Resources Code, to read:

CHAPTER 1.75. NATIVE AMERICAN HISTORICAL, CULTURAL, AND SACRED SITES

5097.9. No public agency, and no private party using or occupying public property, or operating on public property, under a public license, permit, grant, lease, or contract made on or after January 1, 1977, shall in any manner whatsoever interfere with the free expression or exercise of Native American religion; nor shall any such agency or party alter, modify, disturb, remove, destory, or otherwise damage any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine that is located on public property, except with the consent of the Native American Heritage Commission. No such agency or party shall in any manner deny to any Native American free access to any such cemetery, place, site, or shrine, except with consent of the commission.

The state shall not make sales and transfers of public property whenever such a sale or transfer, that involves or affects any such cemetery, place, site, or shrine, has not received the consent of the commission.

The provisions of this chapter shall not be construed to limit the requirements of the Environmental Quality Act of 1970, Division 13 (commencing with Section 21000).

5097.91. There is in state government a Native American Heritage Commission, consisting of nine members appointed by the Governor.

5097.92. The members so appointed shall be appointed from nominees submitted by Native American organizations, tribes, or groups within the state. At least six of the members so appointed shall be elders, traditional people, or spiritual leaders of California Native American tribes. The members shall serve staggered three-year terms, selected by lot so that the terms of three members expire every two years.

5097.93. The members of the commission shall serve without compensation but shall be reimbursed their actual and necessary expenses.

5097.94 The commission shall have the following powers and duties:

(a) To identify and catalog places of special religious or social significance to Native Americans.

(b) To recommend to the Legislature, with priorities, places that are located on private lands, are inaccessible to Native Americans, and have cultural significance to Native Americans for acquisition by the state or other public agencies for the purpose of facilitating or assuring access thereto by Native Americans.

(c) To appoint an executive secretary and necessary clerical staff.

(d) To accept grants or donations, real or in kind, to carry out the purposes of this chapter.

(e) To serve, in cooperation with the Department of Parks and Recreation, as the policy and planning body, in the California State Indian Museum and for other collections of Native American artifacts owned or controlled by the Department.

(f) To exercise powers of consent to uses, sales, and transfers of property, as provided in Section 5097.9.

5097.95. Each state and local agency shall cooperate with the commission in carrying out its duties under this chapter. Such cooperation shall include, but is not limited to, transmitting copies of all environmental impact reports relating to property identified by the commission as of special religious or social significance to Native Americans or which is reasonably foreseeable as such property.

Final Version of AB4239

The people of the State of California do enact as follows:

SECTION 1. Chapter 1.75 (commencing with Section 5097.9) of Division 5 of the Public Resources Code is repealed.

SECTION 2. Chapter 1.75 (commencing with Section 5097.9) is added to Division 5 of the Public Resources Code, to read:

CHAPTER 1.75. NATIVE AMERICAN HISTORICAL,

CULTURAL, AND SACRED SITES

5097.9. No public agency, and no private party using or occupying public property, or operating on public property, under a public license, permit, grant, lease, or contract made on or after July 1, 1977, shall in any manner whatsoever interfere with the free expression or exercise of Native American religion as provided in the United States Constitution and the California Constitution; nor shall any such agency or party cause severe or irreparable damage to any Native American sactified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, except on a clear and convincing showing that the public interest and necessity so require. The provisions of this chapter shall be enforced by the commission pursuant to Sections 5097.94 and 5097.97.

The provisions of this chapter shall not be construed to limit the requirements of the Environmental Quality Act of 1970, Division 13 (commencing with Section 21000).

The public property of all cities, counties, and city and county located within the limits of the city county, and city and county, except for all parklands in excess of 100 acres, shall be exempt from the provisions of this chapter. Nothing in this section shall, however, nullify protections for Indian cemeteries under other statutes.

5097.91. There is in state government a Native American Heritage Commission, consisting of nine members appointed by the Governor with the advice and consent of the Senate.

5097.92. At least five of the nine members shall be elders, traditional people, or spiritual leaders of California Native American tribes, nominated by Native American organizations, tribes, or groups within the state. The executive secretary of the commission shall be appointed by the Governor.

5097.93. The members of the commission shall serve without compensation but shall be reimbursed their actual and necessary expenses.

5097.94. The commission shall have the following powers and duties:

(a) To identify and catalog places of special religious or social significance to Native Americans.

(b) To make recommendations relative to Native American sacred places that are located on private lands, are inaccessible to Native Americans, and have cultural significance to Native Americans for acquisition by the state or other public agencies for the purpose of facilitating or assuring access thereto by Native Americans.

(c) To make recommendations to the Legislature relative to procedures which will voluntarily encourage private property owners to preserve and protect sacred places in a natural state and to allow appropriate access to Native American religionists for ceremonial or spiritual activities.

(d) To appoint necessary clerical staff.

(e) To accept grants or donations, real or in kind, to carry out the purposes of this chapter.

(f) To make recommendations to the Director of Parks and Recreation and the California Arts Council relative to the California State Indian Museum and other Indian matters touched upon by department programs.

(g) To bring an action to prevent severe and irreparable damage to, or assure appropriate access for Native Americans to, a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, pursuant to Section 5097.97. If the court finds that severe and irreparable damage will occur or that appropriate access will be denied, and appropriate mitigation measures are not available, it shall issue an injunction, unless it finds, on clear and convincing evidence, that the public interest and necessity require otherwise. The Attorney General shall represent the commission and the state in litigation concerning affairs of the commission, unless the Attorney General has determined to represent the agency against whom the commission's action is directed, in which case the commission shall be authorized to employ other counsel. In any action to enforce the provisions of this subdivision the commission shall introduce evidence showing that such cemetery, place, site, or shrine has been historically regarded as a sacred or santified place by Native American people and represents a place of unique historical and cultural significance to an Indian tribe or community.

(h) To request and utilize the advice and service of all federal, state, local, and regional agencies.

(i) To assist Native Americans in obtaining appropriate access to sacred places that are located on public lands for ceremonial or spiritual activities.

(j) To assist state agencies in any negotiations with agencies of the federal government for the protection of Native American sacred places that are located on federal lands.

5097.95. Each state and local agency shall cooperate with the commission in carrying out its duties under this chapter. Such cooperation shall include, but is not limited to, transmitting copies, at the commission's expense, of appropriate sections of all environmental impact reports relating to property identified by the commission as of special religious significance to Native Americans or which is reasonably foreseeable as such property.

5097.96. The commission may prepare an inventory of Native American sacred places that are located on public lands and shall review the current administrative and statutory protections accorded to such places. The commission shall submit a report to the Legislature no later than January 1, 1979, in which the commission shall report its findings as a result of these efforts and shall recommend such actions as the commission deems necessary to preserve these sacred places and to protect the free exercise of the Native American religions.

5097.97. In the event that any Native American organization, tribe, group, or individual advises the commission that a proposed action by a public agency may cause severe or irreparable damage to a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, or may bar appropriate access thereto by Native Americans, the commission shall conduct an investigation as to the effect of the proposed action. Where the commission finds, after a public hearing, that the proposed action would result in such damage or interference, the commission may recommend mitigation measures for consideration by the public agency proposing to take such action. If the public agency fails to accept the mitigation measures, and if the commission finds that the proposed action would do severe and irreparable damage to a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, the commission may ask the Attorney General to take appropriate legal action pursuant to subdivision (g) of Section 5097.94.

SEC. 3. The sum of thirty-three thousand dollars ($33,000) is appropriated from the General Fund to the Native American Heritage Commission for support of the commission.

SEC. 4. No appropriation is made by this act, nor is any obligation created thereby under Section 2231 of the Revenue and Taxation Code, for the reimbursement of any local agency for any costs that may be incurred by it in carrying on any program or performing any service required to be carried on or performed by it by this act.

Appendix II

On March 19, 1974, the California State Attorney-General's Office sent to State Senator Albert S. Rodda an opinion summarizing the legal protections available for Native cemeteries. This opinion is herein reprinted because it should be useful to all groups seeking protection.

It is significant that this opinion has not been utilized by local law enforcement agencies as a guide to developing their own local programs of cemetery protection.

Many of the court decisions cited herein are applicable to states other than California.

March 19, 1974

The Honorable Albert S. Rodda
State Senator
Fifth Senatorial District
State Capitol
Sacramento, California 98514

Re: SO 73/32 II
Request for Opinion on Preventing the Disturbance of Indian Burial Sites and Related Matters

Dear Senator Rodda:

You have requested the opinion of this office on the following questions relating to chapter 827, Statutes of 1971:

1. Does chapter 827 give the task force created pursuant to its provisions the power to prevent the disturbance of native California Indian burial sites?

2. Does chapter 827 authorize the State of California to prevent the disturbance of native California Indian burial sites? If it does, what agency has this responsibility?

3. Is there any provision of law other than chapter 827 which could be used by a state agency or a private citizen to prevent the disturbance of native California Indian burial sites?

4. Does the task force created by chapter 827 have the power to request opinions from the Attorney General's Office; and if so, who is financially responsible for the cost of preparing the opinion?

Our conclusions may be summarized as follows:

Question 1:

The task force created by chapter 827 is no longer in existence. The responsibility and authority of State agencies to enforce the moratorium are discussed in Part 2 of this letter.

Question 2:

Chapter 827 does authorize the State of California to prevent the disturbance of native California Indian burial sites. The Attorney General has this authority, and may act either upon his own initiative or at the request of the Secretary of the Resources Agency.

Question 3:

A number of civil and criminal provisions may be used either by state agencies or private citizens to prevent the disturbance of native California Indian burial sites. These provisions are discussed in the analysis of question number 3.

Question 4:

The Secretary of the Resources Agency or the head of any department within said Agency has the power to request opinions from the Attorney General's office concerning questions arising out of the work or report of the task force. The department most likely to require such an opinion would be the Department of Parks and Recreation. If an opinion on this matter is requested by the Secretary of the Resources Agency or the Director of Parks and Recreation, the cost of preparing the opinion would be borne by the Department of Justice.

ANALYSIS

Question 1. DOES CHAPTER 827 (Stats. 1971) GIVE THE TASK FORCE CREATED PURSUANT TO ITS PROVISIONS THE POWER TO PREVENT THE DISTURBANCE OF NATIVE CALIFORNIA INDIAN BURIAL SITES?

Pursuant to chapter 827, Statutes of 1971,[1] the task force established by that same chapter was dissolved on December 31, 1973, after having submitted to the Secretary of the Resources Agency the plan or proposed legislation required by Public Resources Code section 5097.91. As discussed more fully below, the current authority and responsibility vested in State agencies for enforcing the moratorium are vested in the Attorney General, acting on his own initiative or at the request of the Secretary of the Resources Agency.

Question 2. WHAT STATE AGENCIES, IF ANY, ARE AUTHORIZED BY CHAPTER 827 TO PREVENT THE DISTURBANCE OF NATIVE CALIFORNIA INDIAN BURIAL SITES?

A. Chapter 827 Authorizes the State of California to Prevent the Disturbance of Native California Indian Burial Sites on Private as Well as Public Lands.

The first sentence of Public Resources Code section 5097.93 provides:

> "It is the intent of the Lesiglature that there shall be a moratorium on the disturbance of native California Indian burial sites abandoned less than 200 years. . . ."

In this sentence the Legislature has clearly stated its intent to impose a "moratorium" on any disturbance until such time as it has the opportunity to act upon the report of the Secretary of the Resources Agency provided for in Public Resources Code section 5097.91.

Within the context of chapter 827 a "moratorium," is a period of "obligatory delay" or a "temporary ban" (cf. BLACK, LAW DICTIONARY 1160 (4th ed. 1951); WEBSTER, THIRD

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1. Chapter 827 is codified as sections 5097.9 - 5097.96 of the Public Resources Code. Its provisions are attached as an appendix to this opinion.

INTERNATIONAL DICTIONARY 1469 (1961); that is to say, the Legislature has imposed a period of obligatory delay or placed a ban upon the disturbance of the burial sites to which section 5097.93 applies until such time as it acts upon the report referred to above.

The second sentence of Public Resources Code section 5097.93 provides: "No state agency shall permit archaeological excavation in any native California Indian burial site abandoned less than 200 years during the period of such moratorium." Read together, the first and second sentences of section 5097.93 are susceptible of two meanings: (1) The first sentence can be read as a complete definition of the moratorium and the second sentence merely as a directive to the state agencies to comply with that moratorium by not granting permission to excavate. (2) On the other hand, the second sentence can be read as a definition of the word "moratorium" as that word appears in the first sentence, in which case the moratorium declared would consist only of the directive to the state agencies not to permit archaeological excavation in any such site.

The fundamental rule of statutory construction is to ascertain legislative intent so as to effectuate the purpose of the law. Select Base Materials, Inc. v. Board of Equalization, 51 Cal 2d 640, 645 (1959). A close examination of chapter 827 has convinced us that the first meaning is that intended by the Legislature. In reaching this decision we have considered the following factors:

1. The first meaning places an obligatory delay on all "disturbances" of such burial sites while the second prohibits only "excavation," and then only where regulated by a state agency; since "disturbance" is a much broader term than "excavation," and since the legislative findings of section 5097.9 speak in broad terms of the state's effort "to preserve and salvage these precious resources," it seems that the broader definition is more consistent with the Legislature's purpose. We think the Legislature meant to reach any activity that tends to disturb such burial grounds, not merely those disturbances which also fall under the definition of "excavation." The term "disturbance" would not, of course, include carefully conducted activities directed toward a determination as to whether a particular area was or was not an Indian burial site.

2. The second interpretation of section 5097.93 would restrict the operation of chapter 827 to lands under the jurisdiction of state agencies. Such an interpretation would not carry out the legislative intent to apply the moratorium to private as well as public land found in Public Resources Code section 5097.9. In that section the Legislature points out that it is addressing itself to a problem caused by both "public and private land development." (Emphasis added.)

3. The fact that the Legislature did not expressly restrict the operation of chapter 827 to any category of land is of considerable weight. We note that the Legislature did expressly restrict the operation of Public Resources Code sections 5097 - 5097.6 (chapter 1136, Statutes of 1965, involving the same general subject matter and codified immediately prior to chapter 827 in the Public Resources Code) to lands owned by or under the jurisdiction of the state: For example section 5097.5 makes it a misdemeanor for any person "to knowlingly and willfully excavate upon, or remove, destroy, injure or deface any historic or prehistoric ruins, burial grounds, archaeological or vertebrate paleontological site. . .situated on public lands. . ." (Emphasis added.) No such restriction to public lands is found within chapter 827.

Thus, we conclude that Public Resources Code section 50-97.93 has created an obligatory delay or temporary ban applicable to both public and private lands.

In creating such a moratorium, it follows that the Legislature was also authorizing the state to enforce it. To interpret the act as creating an unenforceable moratorium to salvage and protect precious natural resources would be destructive of legislative intent. An unenforceable moratorium is hardly a moratorium.

It follows, therefore, that the Legislature has created a moratorium enforceable by the state.

B. In Determining Whether a Burial Site is "Abandoned," and Thus Protected by the Provisions of Chapter 827, Reference Should be Made to Traditional Indian Customs Rather than Technical Definitions

We think it appropriate at this point to note that the Legislature has restricted the terms of the moratorium to those sites "abandoned less than 200 years." In California "abandonment" has been defined as "the voluntary giving up of a thing by the owner because he no longer desires to possess it or to assert any right or dominion over it and is entirely indifferent as to what may become of it or who may thereafter possess it." Martin v. Cassidy, 149 Cal. App. 2d 106, 110 (1957).

Research, however, has uncovered very little California law relating to nonstatutory abandonment of burial sites. Statutory abandonment of a cemetery by a public cemetery district is controlled by Health and Safety Code sections 9201 et seq.; city or county abandonment of a cemetery which threatens or endangers the health and welfare of the public is controlled by Health and Safety Code section 8825. Neither would seem to apply to the vast majority of native California Indian burial sites.

The only California case that does touch upon an abandonment situation which is not controlled by a statutory scheme is Weisenberg v. Truman, 58 Cal. 63, 69 (1881). In that case, in which the ultimate issue was ownership of real estate, the Court noted that a cemetery with some bodies still interred therein is not necessarily abandoned because it is no longer used for interment purposes.

In jurisdictions where the question of abandonment has been treated in detail, one of two rules has usually been adopted. The first rule is well stated in 14 Am. Jur. 2d Cemeteries, 21 (1964) wherein it is said:

> "However, as long as a cemetery is kept and preserved as a resting place for the dead with anything to indicate the existence of graves, it is not abandoned. Thus, where the bodies interred in a cemetery remain therein and the spot awakens sacred memories in living persons, the fact that for some years no new interments have been neglected does not operate as an abandonment and authorize the desecration of the graves." Id. at p. 726.
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> Adams v. State, 95 Ga. App. 295, 97 S.E. 2d 711, 715 (1957);
> Smith v. Ladage, 397 Ill. 336, 74 N.E. 2d 497 (1947);
> Campbell v. Kansas City, 102 Mo. 326, 13 S.W. 897, 901 (1890);
> Andrus v. Remmert, 136 Tex. 179, 146 S.W. 2d 728, 149, S.W. 2d 584 (1941).

Other jurisdictions follow a second, more rigid rule that requires the authorized removal of the bodies interred therein to work an abandonment. Bowen v. Hooker, 372 S.W. 2d 257 (Ark. 1963); Frost v. Columbia Clay Co., 130 S.C. 72, 124 S.E. 767, 768 (1924); Roundtree v. Washington, 57 Wash. 414, 107 P. 345 (1910). See also Heiligman v. Chambers, discussed, infra, at pages 17 and 18 of this letter, and In re Board of Transportation v City of New York, 140 Misc. 557, 251 N.Y.S. 409, 419 (1931). Either rule, if applied to the statute at hand would seem to except the vast majority of, if not all, the native California Indian burial sites from the operation of the moratorium either because the sites are still sacred to native California Indians or because bodies are still interred therein. It is, therefore, doubtful that the California Legislature meant to set up either of these rules as a test for determining which Indian burial sites ought to be protected by the moratorium and we are reluctant to apply either of the definitions. Indeed, it seems that native Indian burial sites would have greater archaeological, paleontological and historical value by virtue of their sacredness to the relevant Indians and by virtue of the fact that the remains and artifacts therein had not been removed. Thus, application of either of these technical definitions of the term "abandon" would exclude those sites most deserving of protection and we must look elsewhere for a proper interpretation of this term.

Research into the traditional practices of disposal of dead bodies by native California Indians shows that the vast majority of California Indians interred their dead immediately adjacent to or actually within the confines of their habitations, villages or living areas. In some cases, interment was done beneath the very abode of the deceased. In this regard, see A. L. KROEBER, HANDBOOK OF THE INDIANS OF CALIFORNIA, pages 46, 215, 300, 313, 361, 404, 557 and 750, and particularly at 499 (1925).

Considering the purpose of the statute and the traditional practices of California Indians, we are of the opinion that the word "abandonment" is used in an archaeological

sense and refers to discontinued use of a site as a habitation. Words in a statute should be construed in context, keeping in mind the nature and obvious purpose of the statute. England v. Christensen, 243 Cal.App. 2d 413, 422(1966). Thus, in our opinion, a burial site "abandoned less than 200 years" is one over which or near which Indians have ceased to live within 200 years prior to the passage of the Act.

C. The Attorney General is Authorized to Initiate Civil Actions to Prevent the Disturbance of Native California Indian Burial Sites under Chapter 827, Statutes of 1971.

Article 5, section 13, California Constitution, provides in part:

"Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be his duty to see that the laws of the State are uniformly and adequately enforced. . . ."

Government Code section 12512 provides:

"The Attorney General shall attend the Supreme Court and prosecute or defend all causes to which the State, or any State officer is a party in his official capacity; and all causes to which any county is adverse to the State or some State officer acting in his official capacity."

The above-quoted sections of the Constitution and the Government Code provide the Attorney General with the power to enforce the laws of California by bringing appropriate actions on behalf of the State and the people. In fact, the Attorney General has the power, in the absence of legislative restriction, to file any civil action or proceeding directly involving the state's rights and interests or any action deemed necessary by him to enforce state laws, preserve order, and protect public rights and interests. People v. Centr-O-Mart, 34 Cal.2n 702, 702(1950); Pierce v. Superior Court in and for Los Angeles County, 1 Cal.2d 759, 761-62 (1934). Since chapter 827 does not vest exclusive (or any) authority in any other state agency, there was clearly no legislative intent to limit the general terms of Government Code section 12512. CF. People v. New Penn Mines, Inc., 212 Cal. App.2d 667 (1963). We conclude, therefore, that the Attorney General is authorized to commence civil actions to prevent the disturbance of native California Indian Burial sites in violation of chapter 827.

Any criminal violations arising out of the statutes referred to on pages 13-14 hereof would normally be prosecuted by the District Attorney. Govt. Code 26500.

D. The Resources Agency is also Authorized to Request Legal Proceedings to Prevent the Disturbance of Native California Indian Burial Sites under Chap. 827 (Stats. 1971).

Further we are of the opinion that authority to prevent the disturbance of Native California Indian Burial sites under chapter 827, stats. of 1971 rests with the Resources Agency of the State of California. The task force referred to above, although expressly created by the Legislature, was an arm or a creature of the Resources Agency; thus, the task force was established by the Secretary of the Resources Agency, who determined the number and composition of its members (see Public Resources Code section 5097.92) and it was to submit plans or recommend legislation in a report to the Secretary of Resources (see Public Resources Code section 5097.91). Moreover, the purpose of chapter 827 was to insure that the Secretary of the Resources Agency, through the task force and the other means at the Agency's disposal, prepare a coordinated study of the problem while native California Indian burial sites were being protected by the moratorium. The moratorium, which is discussed in some detail in this letter, and the responsibility given to the Secretary of the Resources Agency to coordinate the study of the problem both appear in chapter 827.

It is our opinion that the moratorium is an essential part of the responsibility given to the Resources Agency to seek long-term solutions to the problem of the disappearance of California's native Indian burial sites. Chapter 827 is so drafted that the Resources Agency may devote time and manpower to the study of the problems involved, with assurance that the moratorium may be used to temporarily protect the subject Indian burial sites from disturbance. It is our opinion, therefore, that chapter 827 should be read to authorize the Resources Agency, acting by itself or by means of its supervisory

powers over its appropriate constituent department or departments (see Government Code section 12850), to request the initiation of legal proceedings to enforce the moratorium established by chapter 927.

It is well settled in this state that governmental officials may exercise not only those powers expressly set forth by statute, but also such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as may fairly be implied from the statute granting the powers. Dickey v. Raisin Proration Zone No. 1, 24 Cal.2d 796, 810 (1944).

Question 3. WHAT PROVISIONS OF LAW OTHER THAN CHAPTER 827 CAN BE USED BY STATE AGENCIES OR PRIVATE PERSONS TO PREVENT THE DISTURBANCE OF NATIVE CALIFORNIA INDIAN BURIAL SITES?

Before setting forth specific code sections in answer to Question 3, we think it important to set forth the general policy of the State of California relating to burial sites. This policy is stated as follows in Eden Memorial Park Assn. v. Superior Court of Los Angeles County, 189 Cal. App. 2d 421, 424-25 (1961) (a case which holds that property dedicated to cemetery purposes is not subject to condemnation for highway purposes):

> "It has long been the policy of this state that places where the dead are buried shall be protected and preserved against interference, molestation or desecration. This policy was first expressed by the Legislature in 1859 when by statute the Legislature exempted all cemeteries from public taxes and provided that so long as the land was held for cemetery purposes no street, avenue, road or thoroughfare should be laid out over it (Stats. 1859, pp. 281, 284), and has been adhered to since that time (see Stats. 1911, p. 1100; Stats. 1931, ch. 1148, p. 2451; Stats. 1939, ch. 60, sections 8558, 8559, 8560 and 8561) and in 1926 the people took away from the government of the state the right to exercise its inherent sovereign power to tax insofar as certain property dedicated to cemetery use was concerned (Cal. Const., art. XIII, section 1b). The Legislature has not only protected burial grounds from molestation and desecration through invasion thereof by the public by means of public roads, highways and thoroughfares, but exempted them from assessments for public improvement, sale on execution and the conveyance thereof from the rule against perpetuities and restraint upon alienation (sections 8559-8561, Health & Saf. Code), and its purpose in so doing is clearly expressed in section 8559 of the Health and Safety Code (this is a codification of Stats. 1931, ch. 1148, section 8) through the following language: 'Dedication to cemetery purposes pursuant to this chapter . . .shall be deemed to be in respect for the dead, a provision for the interment of human remains, and a duty to, and for the benefit, of the general public.'" Id. at pp. 424-25.

Although the Eden Memorial case involved a cemetery formally dedicated pursuant to the Health and Safety Code, it is clear from the foregoing language that the state policy preceded the 1931 Act and that these policies are applicable to all "places where the dead are buried." It is our opinion that these policies are relevant in determining the relief available to both state agencies and private entities to enforce the moratorium created by chapter 827.

A. Provisions Which Can Be Used by State Agencies to Prevent Such Disturbances

1. Equitable Relief.

Government Code section 12600 provides:

"The Legislature finds and declares as follows:
(a) It is the policy of this state to conserve, protect, and enhance its environment. It is the policy of this state to prevent destruction, pollution, or irreparable impairment of the environment and the natural resources of this state.

(b) It is in the public interest to provide the people of the State of California through the Attorney General with adequate remedy to protect the natural resources of the State of California from pollution, impairment, or destruction.

(c) Conservation of natural resources and protection of the environment are pursuits often beyond the scope of inquiry, legislation, or enforcement by local government; several local public entities existing in the same ecological community have acted in differing and, sometimes, conflicting manners; uniform, coordinated, and thorough response to the questions of protection of environment and preservation of natural resources must be assured; and these matters are of statewide concern." (Emphasis added.)

Government Code section 12603 provides:

"This article shall be liberally construed and applied to promote its underlying purposes."

Government Code section 12605 provides:

"As used in this article, 'natural resource' includes land, water, air, minerals, vegetation, wildlife, silence, historic or aesthetic sites, or any other natural resource which, irrespective of ownership contributes, or in the future may contribute, to the health, safety, welfare, or enjoyment of a substantial number of persons, or to the substantial balance of an ecological community." (Emphasis added.)

Finally, Government Code section 12607 provides:

"The Attorney General may maintain an action for equitable relief in the name of the people of the State of California against any person for the protection of the natural resources of the state from pollution, impairment, or destruction."

The foregoing statutes specifically authorize the Attorney General to maintain an action for equitable relief to protect natural resources from pollution, impairment or destruction. The definition of "natural resource" in section 12605 as including historic sties, and the declaration in section 12603 requiring a liberal construction of the entire article convince us that the Legislature intended that definition to include native California Indian burial sites. Thus, to the extent that the "disturbance" of burial sites mentioned in your letter, is synonomous with the "pollution, impairment, or destruction" of natural resources within the meaning of section 12607, it is our opinion that that code section authorizes the Attorney General to maintain an equitable action to prevent such disturbance.

2. Criminal Sanctions.

A number of California statutes seek to prevent the disturbance of those places where human interment has taken place by criminalizing certain activities. In the absence of any specific factual circumstances, it is, of course, impossible to state whether or not these statutes apply to any particular "disturbance" of native California Indian burial site. Nevertheless, a summary of the relevant statutes is set forth herein, because it seems possible that the "disturbances" you have in mind could, under some circumstances, be made criminal by these statutes. Thus, to the extent that any of the following criminal statutes apply to the disturbance of these burial sites, the appropriate public prosecutor has the power to institute criminal proceedings against those responsible for the disturbance.

a. Public Resources Code section 5097.5 provides:

"No person shall knowingly and willfully excavate upon, or remove, destroy, injure or deface any historic or prehistoric ruins, burial grounds, archaeological or vertebrate paleontological site, including fossilized footprints, inscriptions made by human agency, or any other archaeological, paleontological or historical feature, situated on public lands, except with the express permission of the public agency having jurisdiction over such lands. Violation of this section is a misdemeanor.

"As used in this section 'public land' means lands owned by, or under the jurisdiction of, the state, or any city, county, district, authority, or public corporation, or any agency thereof."

Note that this section applies only to those burial grounds and inscriptions, etc. upon public lands. To the extent that "disturbances" involve the acts described in this statute, and if such acts are "knowing and wilful," such disturbance would be a misdemeanor.

b. Penal Code section 662 1/2 may also cover the "disturbance" you refer to in your letter, depending upon the factual situation. It provides:

"Every person, not the owner thereof, who willfully injures, disfigures, defaces, or destroys any object or thing of archeological or historical interest or value, whether situated on private lands or within any public park or place, is guilty of a misdemeanor."

c. There are statutes creating criminal sanctions for the desecration of human remains (Health and Safety Code section 7052) and the theft of valuables therefrom (Penal Code section 642); as well as the desecration of gravesites or cemeteries where six or more people are buried (Health and Safety Code sections 8100 and 8101). These provisions may be applicable where Indian burial sites, although "abandoned" within the meaning set forth herein, are nevertheless sufficiently recognizable that the requisite wrongful intent may be attributed to one who disturbs them.

3. The California Environmental Quality Act of 1970 ("CEQA").

The Environmental Quality Act of 1970, Public Resources Code sections 21000 et seq., after setting forth legislative findings and declarations in sections 21000 and 21001, defines "environment" in section 21060.5 in the following manner:

"Environment means the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." (Emphasis added.)

Considering the legislative findings of this Act, as well as the legislative findings in Public Resources Code section 5097.9, supra, page 3 of this letter, this office believes that native California Indian burial sites are "objects of historical significance" within the meaning of that statute.

Any project, therefore, that may have significant effect upon native California Indian burial sites, and which is directly undertaken by a public agency, or supported by a public agency, or which requires the issuance by one or more public agencies of a lease, permit, license, or certificate or other entitlement for use, must be the subject of an environmental impact report. See Public Resources Code sections 21100, 21101, 21151 and 21063.

Public Resources Code sections 21104 and 21153 provide that in completing an environmental impact report, the responsible state and local agencies "shall consult with, and obtain comments from, any public agency which has jurisdiction by law with respect to the project, and may consult with any person who has special expertise with respect to any environmental impact involved."

Consultations with public agencies and persons with special expertise and public hearings are intended to provide forums by means of which interested persons can call to the attention of the agency undertaking or approving the project their opinions or knowledge concerning adverse environmental effects, mitigation measures or alternative to the proposed project. To the extent that the "disturbance" you speak of in your letter is incompatible with the responsible agencies' approval criteria, or to the extent that suggested mitigation or alternative measures are adopted, this office considers the California Environmental Quality Act of 1970 a vehicle for preventing the disturbance of native California Indian Burial sites. Further, it is clear that the Resources Agency, or any department designated by the Secretary to carry out responsibilities in this area (most likely Parks and Recreation) should be consulted in connection with any project which might affect abandoned Indian burial sites.

B. Provisions Which Can Be Used by Private Persons to Prevent Such Disturbances.

In the absence of a specific factual situation, it is difficult to make meaningful statements about who can utilize certain provisions of law to accomplish a particular purpose; however, certain statutory causes of action can be generally outlined.

1. Remedies available under Chapter 827.

Above, we stated our opinion that chapter 827 created a moratorium on the disturbance of native California Indian burial sites. We further stated our opinion that the Attorney General has the power to enforce this moratorium.

Chapter 827 does not define what persons have standing to enforce the moratorium. However, as noted above, Public Resources Code section 21060.5 has defined the environment as including objects of historic significance. Sections 21000 and 21001 declare the existence of a broad public interest in the maintenance of a high quality environment. Cases arising in this state indicate that persons deriving a personal benefit from a resource of interest to the public at large have standing to prevent the destruction of such resource in violation of the law. Cf. Alameda Conservation Assn. v. State of California, 437 F.2d 1087, 1093 (9th Cir. 1971); Marks v. Whitney, 6 Cal.3d 251, 261-62 (1971); Environmental Defense Fund v. Coastside County Community District, 27 Cal. App. 3d 695 (1972). Thus any member of the public who can show that he has a special or personal interest in the preservation of a particular burial site containing objects of historic interest may have standing to enjoin activities which substantially threaten such burial site in violation of chapter 827.

2. Remedies available to descendants of the interred.

Although not based on any particular statutory provision, the following legal theory may afford certain citizens the right to prevent the disturbance of native California Indian burial sites under certain narrowly defined circumstances; we have, therefore, included a brief explanation of it in this letter.

Assuming that a native California Indian burial site is situated on land once owned by the families of those interred therein and that it is marked well enough to provide notice of its existence, it may be that the descendants or heirs of those interred within the burial site have retained a property interest in the burial site. Even if another party has a deed showing title to the land in question, there are authorities holding that title to land devoted to burial purposes passes with an easement against the fee (Italics added by editor).

In Heiligman v. Chambers, 338 P. 2d 144 (Okla. 1959), it was held that the creation of a family burial plot in 1883 on the lands of the Cherokee Nation created an easement against the fee preventing the defendant-owner from injuring or defacing the sepulchre and burial place or from covering it with dirt and rubbish and from disinterring and removing the bodies interred therein despite the lack of any reservation in the chain of title. In issuing an injunction at the request of plaintiff, a descendant of a person buried in the plot, the court said:

> "When a family burial plot is established, it creates an easement against the fee, and while the naked legal title will pass, it passes subject to the easement created. The easement is in favor of the person creating and establishing the burial plot and the right inherent in such person descends to his heirs. The easement and rights created thereunder survive until the plot is abandoned either by the person establishing the plot or his heirs, or by removal of the bodies by the person granted statutory authority. Nicholson v. Daffin, 142 GA. 729, 83 S.E. 658, L.R.A. 1915E, 168; Trefy v. Younger, 226 Mass. 5, 114 N.E. 1033; Hook v. Joyce, 94 Ky. 450, 22 S.W. 651, 21 L.R.A. 96; Roanoke Cemetery Co. v. Goodwin, 101 Va. 605, 44 S.E. 769; Boyd v. Ducktown Chemical & Iron Co., 19 Tenn.App. 392, 89 S.W. 2d 360. Id. at 148."

See Rose v. Rose, 314 Ky. 761, 237 S.W. 2d 80 (1951) and Hines v. State, 126 Tenn. 1, 149 S.W. 1058 (1911); see also Bowen v. Hooker, 372 S.W. 2d 831, 833 (Tex. Civ. App. 1938); Houston Oil Co. v. Williams, 57 S.W. 2d 380, 384-85 (Tex. Civ. App. 1933).

There is some authority to the contrary holding that the descendants of a fee owner who had created a family burial plot were not able to enjoin the desecration of the graves

therein. Wooldridge v. Smith, 243 Mo. 190, 147 S.W. 1019 (1912). That case, however, appears distinguishable since the original land owner had not complied with certain statutory requirements of the state in creating that burial plot.

Despite this contrary authority, we are of the view that the courts of this state, following the strong policy of protecting places where the dead are buried (see the discussion of Eden Memorial Park Assn. v. Superior Court, 189 Cal.App.2d 421 (1961) quoted and discussed at pages 10-11 of this letter), would, under similar circumstances, follow the rule adopted by Oklahoma in Heiligman v. Chambers, supra, and by Tennessee in Hines v. State, supra, and that, under similar circumstances, the holder of a deed of lands including Indian burial sites would hold it subject to an easement. The holder of such a deed would have no right to disturb the burial sites insofar as such disturbances are incompatible with the rights of the descendants of those buried therein.

Question 4. DOES THE TASK FORCE CREATED BY CHAPTER 827 HAVE THE POWER TO REQUEST OPINIONS FROM THE ATTORNEY GENERAL'S OFFICE; AND IF SO, WHO IS FINANCIALLY RESPONSIBLE FOR THE COST OF PREPARING THE OPINION?

The task force created by chapter 827 was dissolved no later than December 31, 1973. See Public Resources Code section 5097.96, as amended by chapter 1194, Statutes of 1972. Thus, the question as to whether the task force had the power to request opinions from the Attorney General is now moot. However, it is quite possible that either the Secretary of the Resources Agency or the Director of the Department of Parks and Recreation might wish to refer to this office any legal questions which may arise from the work of the task force. Since both of these agencies are 'general fund' agencies for purposes of billing by this office, the costs of any such opinion request would come out of the budget of the Attorney General's Office.

Please let us know if this office may be of any further assistance.

Very truly yours,

EVELLE J. YOUNGER
Attorney General

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